In the Supreme Court of the United States

OCTOBER TERM, 1962

SALVATORE PANICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENT TO GOVERNMENT'S BRIEF IN OPPOSITION

Up to now it has been impossible, because of the pendency in the Second Circuit of the appeal from the main conviction on narcotics charges, to place before this Court the complete transcript of the trial during which the petitioner committed the acts of contempt involved here. This difficulty was explained in detail in the petition for a writ of certiorari (Pet. 4–8). Although petitioner conceded that the records initially submitted were inadequate and stated his intention to file the complete transcript following the argument in the court of appeals during the week of January 28, 1963 (Pet. 7), petitioner has in fact filed only a supplemental appendix relating to the matter of his mental competency. And since the government had already requested and been

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granted two extensions because of the inadequacy of the record submitted, it undertook to answer the petition on the basis of the record before the Court, referring only generally to the conduct of the other defendants as reflected in published opinions.

The full transcript has now become available and we have lodged it with the Clerk of this Court. It is, we believe, relevant to petitioner's contention that the issue of his contempt should have been adjudicated under the procedure prescribed by Rule 42(b), F.R. Crim. P. Petitioner's behavior was not an isolated phenomenon; it was part of a larger pattern of obstructive efforts in which his codefendants, whose summary convictions for contempt have been affirmed, were also participants. The purpose of this supplement is to point out briefly how petitioner's conduct, set forth in more detail in the government's principal brief in opposition, paralleled the conduct of his co-defendants.

1. Efforts to prevent or terminate trial because of lack of counsel

After the declaration of mistrial which terminated the original proceeding, five defendants claimed to be unable to obtain counsel.[1] Though cited for contempt they were found not guilty because of the absence of precedent for such an action. Rather than encounter further delays on this account, the govern-

[1] Lack of counsel had resulted in defendant Sancinella's obtaining a severance during the first trial. *United States* v. *Bentvena*, 288 F. 2d 442, 445–446 (C.A. 2).

ment obtained a severance as to these defendants (matter sealed by the trial court, pp. 173–174).[2]

Various other difficulties arose as to lack of counsel or attempted withdrawal of counsel immediately before the second trial (pre-trial transcript 18–20, 34, 36–37, 598–620). As noted in the brief in opposition, petitioner himself made an appeal to the court in support of the request by his counsel, Mr. Aronne, to withdraw just before trial and, during the impaneling of the jury, shouted that he had no lawyer and demanded to know if this were Russia (C. 3–4). A few minutes after petitioner's demonstration, defendant Loicano, for whom the same attorney—Mr. Todaro—had been appointed by Judge MacMahon, stated before the panel that Mr. Todaro did not represent him, and so reasserted after the court corrected him (Tr. 70). Counsel had been appointed for Loicano because his retained attorney, Mr. Cosentino, was in the hospital on the day of trial. A few days later Mr. Cosentino appeared in court but asked to withdraw for various reasons connected with the interim representation of his client (Tr. 1715–1717). Mr. Cosentino admitted that he had discussed his heart condition with the court before the trial commenced, that

[2] At the outset of this trial, the Assistant United States Attorney moved that all defendants be remanded to custody, and brought certain matters to the attention of the court in chambers. The record relating to these matters was sealed in order to avoid publicity which might affect the fairness of the trial.

he had made a number of applications for adjournment on that ground during the first trial, and that Loicano was familiar with the condition but had nevertheless insisted upon his remaining in the case. Judge MacMahon declared that he would accept substitution of another attorney, with Loicano's consent, but otherwise could not accept the withdrawal (Tr. 1719–1725).[3]

Difficulties were also encountered with regard to the representation of co-defendant Galante. Prior to trial the court permitted Galante's retained counsel, Mr. Iannuzzi, to absent himself while another attorney, Miss Kahn, represented Galante, but only upon Iannuzzi's express promise that he would come any time Miss Kahn could not be present (Tr. 55). However, when Miss Kahn, claiming to have been injured, went to the hospital, Iannuzzi was willing to appear on Galante's behalf only under threat of a contempt citation and continued his protests until he, too, went to the hospital with a claimed illness (Tr. 7415–7419, 7507–7509a, 7640–7642, 7682–7683, 7833–7837, 7863, 7869–7874). The court stated that it had ordered medical examinations of both Miss Kahn and Mr. Iannuzzi and that the doctors could not discover objective symptoms of any kind (Tr. 8083). Another attorney was appointed to represent Galante (Tr. 8092–8093).

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[3] The court made a copy of the transcript available and also offered to permit Mr. Cosentino to make an opening statement and to recall any witness for further cross examination (Tr. 1725–1727).

2. Efforts to terminate trial by statements prejudicial to co-defendants

It will be recalled that petitioner, during the trial, referred to some of his co-defendants as "junk pushers" (C. 4, Tr. 5638, 5889). Similarly, defendant Mirra, when asked upon cross-examination if he knew Loicano, replied "Mr. Rosner, believe me, I don't know any of them junk pushers, none of them." Later, asked if he knew Galante, Mirra said, "I don't know any of these guys. They are all dope pushers." As when petitioner used the same term against co-defendants, there were motions for a mistrial by the other defendants (Tr. 6434–6435).

3. Efforts to terminate trial by irrational conduct

The only other defendant who was alleged to be incompetent to stand trial was Frank Mari. He, too, it was claimed, was paranoid or schizophrenic and suffered persistent headaches. After hearing testimony by two psychiatrists named by the court and one called by this defendant, the court found him competent to be tried (pretrial transcript 418–578). A suggestion of incompetency was made as to petitioner's brother Carmine by Mr. Aronne, counsel for both Panicos, who told the court that, in his opinion, both were "a little balmy" (Tr. 5679).

Seemingly irrational behavior was, however, a pattern in the case. During the examination of government witness Smith, defendant Sciremammano interrupted to demand, "Why don't you tell the truth? Why don't you stop lying?" (Tr. 1481). Defendant

Struzzieri interrupted the same witness by shouting, "He is getting $5,000 more for lies today. Why don't you tell the truth, Smitty?" (Tr. 1558). And defendant Monastersky cried: "Smitty, your story is a little mixed up from last time, what did they promise you, $10,000 more this time?" (Tr. 1656–1657).

On another occasion, while Judge MacMahon and others were in the robing room, defendant Ormento broke away from the marshals, pounded on the door of the robing room and shouted obscenities. His attorney explained to the court that Ormento was in physical pain and that his words were intended for the Assistant United States Attorney, not for the judge (Tr. 3491–3494, sealed by the court).

After petitioner's outburst of May 23—in which he entered the jury box, shouting and pushing the jurors (C. 4–5, Tr. 5638–5640)—his brother Carmine joined in: "(To the Court) You think that he's all right. What you're doing, it is a shame, it ain't fair, to allow a frame. A lousy bum like that (Pointing to the Court.) A shame in your heart that you stand up there near the flag which I served for." As the marshals were escorting him from the courtroom, he pointed at Judge MacMahon and the prosecutor and said, "It is a dirty shame what you are doing, to ruin families, you bastards" (Tr. 5639). As in the case of other demonstrations during the trial, the court admonished the jury to disregard the episode. When the court prepared to dismiss the jury for the day, defendant Struzzieri interrupted, "[t]hat's right. Go ahead. Tell them. Disregard what Panico says and

everyone else." And, as the marshals were taking him from the room, Struzzieri added, "You must have been in the hospital" (Tr. 5809).

Another tactic adopted by various defendants was to appear to be asleep during the course of the trial. Defendant Mirra, according to his counsel, first attributed his somnolence to medication (Tr. 6496–6498, 6509), claimed he could not remember what the witness on the stand had said (Tr. 6511), and the following day declared that he was in a fog as a result of further medication (Tr. 6603–6604).[4] Shortly afterward, petitioner claimed not to understand what the witness had said, though he did not allege that he had been drugged (Tr. 6524). A few days later, defendant Monastersky complained of being groggy and unable to understand the proceedings because of medication (Tr. 7239–7240, 7375–7379). Later, the complaint was that he had not received medication and that his pain was so great that he could not intelligently follow the proceedings (Tr. 7838–7839).

On one of the occasions when petitioner called a codefendant a "dope pusher," the codefendant threatened to strangle him (Tr. 5889–5890). This threat was later repeated in the courtroom (Tr. 5893). On another occasion, defendant Mirra, angered at a question by the Assistant United States Attorney, stood up and hurled the witness chair at him (Tr. 6462–6464). See government's brief in opposition in ***Mirra***

[4] The detention center doctor later testified that the medication which Mirra had received would not have made him sleepy but would have made him more alert by relieving his distress (Tr. 9202, 9206, 9218, 9220).

v. *United States*, No. 389 Misc., this Term, certiorari denied, December 3, 1962.

4. Efforts to terminate the trial by acts of violence

In addition to the acts of violence which took place at the trial itself, other, much more serious, incidents involving persons associated with the trial occurred outside the courtroom. The information brought to the court's attention by the Assistant United States Attorney, and sealed by the court at the outset of the second trial (see fn. 2, p. 3, *supra*), pertained to happenings which took place after the events referred to in the decision of the court of appeals in *United States* v. *Bentvena*, 288 F. 2d 442, reviewed by Mr. Justice Harlan in *Fernandez* v. *United States*, 81 S. Ct. 642, 5 L. Ed. 2d 682. One of the jurors, a Mrs. Bose, found ground glass in various utensils in her apartment and was excused. The sealed material also elaborated the circumstances surrounding the injury to the foreman of the jury which necessitated the termination of the first trial. See *United States* v. *De Pietro*, 302 F. 2d 612 (C.A. 2). Late on the night before summation, when all the alternates had been exhausted, the foreman of the jury was found at the bottom of a flight of steps leading in to the basement of an abandoned building, his back broken and suffering from a very severe brain concussion. The Assistant United States Attorney also stated to the court that about a month previously, on March 1, he had interviewed a Mrs. Rostelli, who had given him information about the activities of these defendants. Three days later, as she was coming home, she was

brutally murdered (sealed matter 175–177).[5] While we have no specific evidence that these acts of violence and brutality were causally related to the trial, the frequency with which they occurred strongly suggests that there may be a relationship.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

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[5] Two other incidents of violence, which may or may not be connected with the trial of this case, should be mentioned. One of the defense attorneys was "mugged" in the elevator of his apartment on the night before the last day of trial. He was struck across the face and feared injury to his lower front teeth, but appeared at court the following day (Tr. 8099–8102). The Assistant United States Attorney also reported, in connection with his motion early in the trial to remand all defendants, that one of the defendants had been killed between trials. He stated that he mentioned this only because one of the defendants had been injured in an automobile accident under suspicious circumstances during the first trial (sealed matter 174–175; see also *United States* v. *Bentvena*, 288 F. 2d at 446).

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